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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians *ad litem*, on her own behalf and on behalf of all others similarly situated,

Petitioners,

—v.—

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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Petitioners,

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Respondents.

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.2d 880. That court's order denying rehearing *en banc* is not yet reported; it is set out in the Appendix to the Petition for a Writ of Certiorari at 36a. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 400 F. Supp. 326. Copies of all opinions and orders below are set out in the Appendix to the Petition for a Writ of Certiorari (Pet. at 1a-86a).*

* References to the Petition for a Writ of Certiorari are designated herein by the abbreviation "Pet."; the separate Appendix filed together with this Brief is designated "App."; Brief for Respondent in Opposition to Certiorari is designated "Br. Opp.".

Jurisdiction

The judgment of the court of appeals was entered March 16, 1976; a timely petition for rehearing *en banc* was denied April 12, 1976. The petition for a writ of certiorari was filed July 12, 1976; certiorari was granted October 18, 1976. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Constitutional Provision and Statute Involved

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Equal Educational Opportunities Act of 1974 (Title II of Public Law 93-380), 20 U.S.C. §§1701-1758 (Supp. 1975), provides in pertinent part:

> 1701(a) The Congress declares it to be the policy of the United States that—
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to . . . sex . . . .
>
> 1702(a) The Congress finds that—
>
> (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies to those students the equal protection of the laws guaranteed by the fourteenth amendment . . . .

> 1703 No State shall deny equal educational opportunity to an individual on account of his or her . . . sex . . . by—
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of . . . sex . . . among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student . . . .
>
> 1705 [T]he assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of . . . sex . . . .

Question Presented

Whether the Constitution and laws of the United States permit a municipal public school system to maintain totally sex-segregated senior high schools for scholastically-superior students, where the effect is to reserve to males and deny to females access to the school distinguished by its national reputation, superior resources and scientific facilities.

Statement of the Case

Petitioner Susan Vorchheimer commenced this class action on March 29, 1974, pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. At that time, she was a ninth grade student enrolled in her final year at the J. R. Masterman School, a coeducational facility and the only junior high school the Philadelphia School District maintains for academically-gifted students. (Fact Findings 4, 13; Pet. 39a, 41a.) Susan Vorchheimer sought to enjoin the Philadelphia School District from denying academically-qualified female students the equal protection of the laws by barring their access to the Central High School, Philadelphia's most renowned, scholastically-oriented secondary school. (Fact Findings 17, 19-22, 26; Pet. 42a-45a.) Philadelphia School District maintains no coeducational high school for scholastically-superior students. (Fact Findings 7, 8; Pet. 40a.) Pursuant to Fed. R. Civ. P. 23(b)(2), Susan Vorchheimer was certified as the representative of "all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." (Conclusion 3; Pet. 55a.)

Upon graduation from the J. R. Masterman School in June 1974, Susan Vorchheimer was designated "most outstanding student" by that coeducational junior high school for superior students. She received in addition several other awards, including awards in science and geometry. (Fact Finding 14; Pet. 41a.) Despite her conceded academic qualification, her application for admission to Central High School was rejected. She was denied admission to Central solely on the basis of her sex. (Fact Findings 12, 14, 15, Conclusion 4; Pet. 41a-42a, 55a.)

Philadelphia maintains only two academic senior high schools: Central, a school reserved for males, and Girls High which, as the name implies, is confined to females. These two schools differ from other Philadelphia secondary schools in fundamental respects. No other high school in Philadelphia offers the range of courses available at Central or Girls, nor does any other senior high school select its student body solely on the basis of academic testing and achievement. Central and Girls draw students from the entire city. Most Philadelphia high schools are neighborhood schools and are substantially overcrowded; enrollment at Central and Girls is under capacity. (Fact Findings 6, 7, 29, 51; Pet. 39a-40a, 45a, 54a.)

Central and Girls are single-sex schools; the vast majority of public high school students in Philadelphia attend coeducational schools. (Fact Finding 8; Pet. 40a.) A senior high school student seeking the highest quality academic preparation the District offers does not have the choice of attending a coeducational school. (Conclusion 5; Pet. 55a-56a.)

Central was founded in 1836. The first public high school in Philadelphia and the second in the nation, it has consistently maintained a national reputation for academic excellence and the distinction of its graduates. (Fact Findings 17, 19, 20; Pet. 42a, 43a-44a.) Girls High evolved from a school established in 1848 for the primary purpose of training teachers for Philadelphia's public schools. (Fact Finding 18; Pet. 43a.)

It is undisputed that "in the scientific field . . . Central's [facilities] are superior" to those of Girls High. (Pet. 3a. See also Fact Finding 26; Pet. 45a.)

Throughout Central's history, the school's academic standing and reputation as a training ground for community leaders has attracted the interest of national figures. The loyalty of Central's alumni, measured by financial contributions and participation in school affairs, equals the loyalty of many college alumni to their alma mater. Central is the only high school in Philadelphia with a substantial private endowment. (Fact Findings 20-22; Pet. 43a-44a.)

These plain facts, found by the district court and not contested on appeal by Philadelphia School District, explain the unique position of Central. No similar findings were made, nor could they be made, as to Girls: it has not attracted the same national attention, alumni contributions or endowment; its science facilities are inferior to those of Central.

Based on these findings, the district court held that Central's exclusionary policy adversely affects the class Susan Vorchheimer represents: the policy denies them access to a school with an unequaled history and national reputation; it denies them the opportunity to attend a coeducational, academically-superior public high school. (Pet. 83a.) Benefiting women is not one of Philadelphia's objectives in excluding females from Central. (Conclusion 5; Pet. 56a.) Males, not females, the district court determined, are the intended beneficiaries of Philadelphia's discriminatory academic high school arrangement. (Pet. 84a.) Concluding that the arrangement denies females the equal protection of the laws, the court enjoined Philadelphia School District "from refusing to admit [Susan Vorchheimer] or any

other member of the class she represents to Central High School solely on the basis of her sex." (Pet. 86a.)[1]

Responding to a question broader than the one raised by Susan Vorchheimer ("Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?"),[2] the Court of Appeals for the Third Circuit reversed 2-1.[3] The majority acknowledged that "[e]qual educational opportunities should be available to both sexes in any intellectual field." (Pet. 13a.) Further, it called attention to the unquestioned superiority of Central's facilities in the scientific field. (Pet. 3a.) Inexplicably, in light of the record and fact findings below, the majority held that the class of academically-gifted young women Susan Vorch-

[1] The district court's ruling in favor of the class petitioner represents was made in August 1975, on the eve of Susan Vorchheimer's entrance into the eleventh grade. She was then attending George Washington High School, the coeducational comprehensive secondary school in which she elected to enroll in preference to Girls. At George Washington, petitioner's motivation and performance declined due in part to her perception that expectations and demands at the comprehensive school were lower than the standards set by her teachers at the academically-oriented junior high school she had attended. (Fact Finding 16; Pet. 42a.) Transfer to Central, however, was blocked by a September 5, 1975 stay of the district court order obtained by Philadelphia School District from the court of appeals. Ultimately, an application to vacate the stay was granted as to Susan Vorchheimer individually, but not as to the class she represents. By that time, however, Susan Vorchheimer was several weeks into her final high school year. With her secondary school days nearing completion, Susan Vorchheimer was accorded the transfer opportunity too late to utilize it effectively. She continued at George Washington for the few remaining months, and is now a first year student at the University of Pennsylvania.

[2] Pet. 2a.

[3] Judge Gibbons dissented; Judge Weis was joined in the majority by Chief Judge Markey of the Court of Customs and Patent Appeals.

heimer represents is not denied the equal protection of the laws by Philadelphia School District's reservation of the superior Central facility to males. In addition, ruling on a statutory issue not aired in the district court,[4] the majority held Congress could not have meant what it said when it declared in 1974:[5]

> [T]he maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies . . . the equal protection of the laws guaranteed by the fourteenth amendment. 20 U.S.C. §1702(a)(1).

Summary of Argument

I.

Central High School of Philadelphia and Philadelphia High School for Girls are in a class apart from all other Philadelphia School District secondary schools. Central, with admissions limited to boys, and Girls, also a single-sex school, are the only Philadelphia public high schools maintained exclusively for the most highly qualified college-bound students.

Central is the premier institution in the Philadelphia secondary school system. Girls is a distinguished school, but it does not possess Central's unique facilities and endowments. Nor does Girls possess, in the degree Central does, "those qualities . . . incapable of objective measurement . . .

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[4] This issue, the application of the Equal Educational Opportunities Act of 1974, was raised *sua sponte* by the court of appeals.

[5] See also 20 U.S.C. §§ 1703(c), 1705, 1715.

that make for greatness in a school." *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950).

Central is distinguished from all other Philadelphia secondary schools by its long, proud history, its unique reputation for training leaders, its first rank prestige in the community, and the marked influence of its active, loyal alumni, men who hold positions of power in the city, state and nation. Like the women's colleges founded in the late nineteenth century to offer women an education denied them by elite male institutions, Girls does not share the history, leadership training reputation, and influential alumni support that characterize its "brother" school.

More tangible differences also mark Central as the superior school. Central, but not Girls, has a private endowment available for library development, lecture and award programs. Central's science facilities are superior to Girls'.

II.

Philadelphia School District's exclusion of females from "Central," and its assignment of academically-gifted young women to "Girls," signify an inequality even identical facilities and endowments would not cure. The very names the schools bear symbolize this inequality. Given Central's prominence as the historic training ground for the community's dominant actors, preservation of the Central "males only" admission rule cautions young women, at a vital stage in their intellectual and social development, not to anticipate in adulthood full and equal partnership with men.

III.

Repeated recognition has been given by this Court to the preeminent importance of education as a governmental function and concern. The Court has emphasized that equal protection measurement of educational experiences entails more than a checklist of components susceptible to ready quantification. Of overriding importance, the Court has said, are factors "incapable of objective measurement" that contribute to the quality of a school.

The class herein seeks access to more than Central's unquestionably superior scientific facilities. Critical to the interests of the class are all attributes of Central that "make for greatness" in that school, including Central's history, national reputation, and devoted and distinguished alumni. Further, the talented young women whose rights are at stake seek education in an environment facilitating intellectual and social interaction with equally talented young men, interaction that will assist them to cope with the adult world in which they will live and work. In context of the subordinate place so long assigned to women in society, no school "sister" to Central can provide an educational experience genuinely equal in character, quality and effectiveness.

IV.

Exclusion of girls from Philadelphia School District's Central High School, thus from the unique facilities, tangible and intangible, that premier school offers cannot survive examination in the light of this Court's precedent from *Reed* v. *Reed,* 404 U.S. 71 (1971), through *Stanton* v. *Stanton,* 421 U.S. 7 (1975). That body of precedent establishes that explicit gender-based distinctions operating to the detriment of females are inconsistent with the Constitution's equal protection requirement. The Court has acknowledged the nation's "long and unfortunate history of sex discrimination." Central's "males only" admission rule is a product of that history.

"Compensation" for past injustice or disadvantage is not proffered as a rationale for the discrimination at issue. Far from bestowing any benefit on the class herein, Central's closed door dampens the aspirations, reduces the opportunities, and limits the expectations of Philadelphia's academically-gifted young women.

V.

This Court's summary affirmance in *Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.,* 401 U.S. 951 (1971), must be assessed with the facts of that case firmly in view. *William* v. *McNair* upheld exclusion of males from an all-female state college established to give young women education "suitable to their sex." Not even remotely involved in *Williams* v. *McNair* was any claim that males were excluded from the best educational opportunities the state supplied. Complainants in that litigation had a wide choice among state institutions, including prestigious coeducational institutions, for any program they might wish to pursue. In stark contrast, the class herein does claim denial of access to a school more advantageous educationally than any other institution, a school possessing unique qualities that give it unparalleled standing in the community.

VI.

No legitimate educational objective is fairly and substantially served by excluding girls from Philadephia's premier Central school. Achievement of females in the sciences and their preparation for later professional training in scientific fields are objectives manifestly disserved by reservation of Central's concededly superior facilities to males. The premise that sex-segregated education for scholastically-superior students is "natural and reasonable" reflects overbroad, stereotyped generalizations and assumptions of the precise kind this Court has firmly rejected as grounds for separate legal regulation of the sexes. Retention of Central as a male preserve impedes awareness in male students that females are fully equal to them in intellectual capacity, perpetuates inequities to which females are exposed, and in fact is a prime example of them.

No evidence instructive as to the environment, single-sex or coeducational, best suited to Philadelphia's academically-superior students was presented by the School District. Nor is freedom of choice a justification for the School District's policy. For students seeking and qualified for the best academic education Philadelphia offers, there is no coeducation option. The policy in question defies rational justification. It is an anachronism that retards progress toward a society in which women and men stand together as full and equal partners.

VII.

The Equal Educational Opportunities Act of 1974 outlaws school assignments that segregate students on the basis of sex. That Act provides secure support, indepen-

dent of the constitutional ground, for the claim asserted by the class herein. To override the clear language Congress used, the majority below indulged in a tortured analysis of legislative non-history that should attract this Court's disapprobation.

VIII.

The district court certified Susan Vorchheimer as the representative of a precisely defined class: "all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." This certification conformed in all necessary respects to Federal Rules requirements. Deferral of certification until final judgment, a practice commonly employed in Rule 23(b) (2) cases of this genre, was an altogether appropriate exercise of the district court's discretion. Rule 23(a) (1)-(4) prerequisites are fully documented in the complaint, motion papers and trial record. The district court so concluded, and committed no error fatal to effective certification in refraining from rote recitation of each 23(a) (1)-(4) subpart.

Beyond question, the vital controversy initiated by Susan Vorchheimer continues full strength in concrete form for a well-defined class so long as females are denied access to Philadelphia's Central High School. The continuation of this genuine controversy between class members and respondents precludes a mootness disposition in this case.

ARGUMENT

I.

Exclusion of females, solely on the basis of sex, from Philadelphia's Central High School constitutes invidious discrimination against intellectually-gifted young women in violation of the fourteenth amendment's equal protion requirement.

A. *By Reserving the Central High School Exclusively to Academically-Gifted Boys, Assigning Academically-Gifted Girls to the Girls High School, and Offering No Coeducational Facility for Scholastically-Superior Students, the Philadelphia School District Perpetuates a Separate and Unequal Arrangement.*

1. Central High School Is the Philadephia School District's Premier Secondary School; No Other School in the District Shares Central's National Reputation, Rich Endowment, or Superior Scientific Facilities.

Petitioner Susan Vorchheimer and the class she represents, Philadelphia's most highly qualified, college-bound young women, seek to open the doors of Philadelphia's oldest and most distinguished high school, Central High School of Philadelphia, to females.[6] Philadelphia High School for Girls, the only other public high school in Phila-

[6] The Court of Appeals incorrectly characterized this case as one in which the petitioner "does not allege a deprivation of an education equal to that which the school board makes available to boys." (Pet. 12a.) At every stage of this litigation petitioner has maintained that at no school in the Philadelphia system can girls receive an education equal to the one boys receive at Central High. See, *e.g.*, Complaint paras. 13 and 15, App. 9a.

delphia reserved for academically-gifted students,[7] is not Central's equal. Distinguished by superior and unique tangible facilities and endowments, Central also "possesses to a far greater degree [than Girls] those qualities which are incapable of objective measurement but which make for greatness in a . . . school." *Sweatt* v. *Painter,* 339 U.S. 629, 634 (1950). See pp. 21-23 *infra.*

Central High is portrayed in the District Court's Fact Findings as a school uniquely situated by virtue of the "position and influence of [its] alumni, [its] standing in the community, [its] traditions and prestige." *Sweatt* v. *Painter, supra,* 339 U.S. at 634. Founded in 1836, Central was Philadelphia's first public high school and the second public high school in the United States.[8] (Fact Finding 17;

[7] Respondents endeavored to discount the distinctions between Philadelphia's two academic high schools, Central and Girls, and the city's other high schools as well as the differences between Central and Girls. Rejecting respondents' line-blurring effort as to the character of Philadelphia high schools, both courts below observed that Central and Girls are in a class apart from Philadelphia's other secondary schools. (Opinion of the Court of Appeals, Pet. 3a. District Court Fact Findings 5-7, 9, 29; Pet. 39a, 40a, 45a.)

[8] Central's illustrious history is recounted in W. Cornog, School for the Republic (1952) (covering the years 1893-1943) (Plaintiff's Exhibit 7), and F. Edmonds, History of the Central High School of Philadelphia (1902) (covering the years 1836-1893) (Plaintiff's Exhibit 14). These histories ascribe Central's outstanding position to a deliberate design consistently pursued from the time of the school's founding. This design is indicated in the 1938 remarks of Franklin Spencer Edmonds:

> I was a member of the Board of Public Education in the period when district high schools were established. . . . It was never intended that the Central High School should become merely a district school. It was always contemplated that [Central] . . . would perform each year its great function of sending out a group of young men who would become leaders in industry and in life.

Cornog, *op. cit. supra,* at 310.

Pet. 42a.) Central's graduates are prominent in the professional, political, and cultural life of their city, state and nation; the school has a deserved reputation for training future "leaders in all fields of endeavor." (Fact Finding 19; Pet. 43a.) Not only do Central graduates enhance their alma mater's reputation by their accomplishments. In addition, Central High's alumni take an active role in the life of the school through financial contributions and participation in day-to-day affairs, with a dedication and loyalty equal to that of many college alumni. (Fact Finding 22; Pet. 44a.) The Alumni Association of Central High School is influential within Philadelphia "both because of its activities as a group and the individual positions held by its members." (Fact Finding 21; Pet. 44a.)

The Fact Findings describe Girls High as a school distinguished in its own right, but an institution lacking the unique prestige, reputation, and affiliations with community leaders Central enjoys. Organized as an academic high school in 1893, Girls High is the successor to a teacher training school. (Fact Finding 18; Pet. 43a.) Girls' very origin reflects the traditional impediments to achievement by women. Historically, schools for young women, in contrast to the Central School for boys, have not served as training grounds for future "leaders in all fields of endeavor." Rather, schools for girls have "turn[ed] out finely educated women, responsible citizens, who would fill the socially acceptable roles of teacher, philanthropist, social worker, and/or the informed wife and companion of a real leader." L. Baker, I'm Radcliffe! Fly Me!—The Seven Sisters and the Failure of Women's Education 139 (1976).[9]

[9] As dramatically stated by Eunice Fuller Barnard in 1932, woman's education "merely allowed her to get all dressed up, with no place to go." *Ibid.*

Girls High does have alumnae who hold positions of note, but "the number of Girls High graduates who have become influential in business, professional, or academic affairs does not approach the number who have graduated from Central." (Fact Finding 23; Pet. 44a.) Nowhere in the Findings of Fact as to Girls High is there documentation, as there is for Central, of a long, unparalleled history, a unique reputation for training leaders, prestige of the first rank within and outside the community, or the marked influence of active, loyal graduates who hold positions of power in city, state and nation. Like the women's colleges founded in the late nineteenth century to offer women an education denied them by elite male institutions,[10] Girls High is an outstanding school, but it is not the most prominent. That first position, inevitably, is held by Central.

More tangible differences also mark Central as the superior school. Central High is the only Philadelphia public secondary school with a substantial private endowment. (Fact Finding 28; Pet. 45a.) Central's library of over 50,000 books has been made possible to a large extent by its private endowment. (Testimony of Ralph Keen, App. 39a.) In part through its reputation as a training ground for community leaders (Fact Finding 20; Pet. 43a) and in part through its private endowment (Testimony of Ralph Keen, App. 38a-39a), Central has attracted the attention of national leaders. Presidents Polk and Theodore Roosevelt are among the notables who visited Central during its early decades. (Fact Finding 20; Pet. 43a.) In more recent years, under the auspices of the Barnwell Foundation, a private fund established for the benefit of Central High School, Attorneys General Robert Kennedy and Elliot Richardson,

[10] See pp. 39-40 *infra*.

Vice-President Hubert Humphrey, and consumer advocate Ralph Nader have addressed Central students. (Fact Finding 20; Pet. 43a. Testimony of Ralph Keen, App. 38a.) In a symbolic gesture reflecting its proud traditions and history, Central alone of Philadelphia's high schools confers a Bachelor of Arts degree upon its graduates. (Complaint para. 13, Answer para. 6; App. 9a, 15a.)[11]

In marked contrast, Girls High has no substantial endowment to buy books, sponsor lectures or make awards; it has no outstanding speakers program.[12] Girls' library is only three-fifths the size of Central's (Testimony of Ruth M. Klein, Tr. 223; Testimony of Ralph Keen, App. 39a.) Like Philadelphia secondary schools other than Central, Girls awards only the standard high school diploma.

Central's science facilities cap the long list of the school's unique features. Without dispute, Central has science facilities superior to those at Girls.[13] (Fact Findings 26; Pet. 45a. Opinion of the Court of Appeals, Pet. 3a.) Central

[11] Central students also rank higher on standardized tests: 51% of Central's students, but only 43% of Girls High students, ranked in the 85th percentile or above on the California Achievement Test. (Fact Finding 51; Pet. 54a.)

[12] It is unlikely, for example, that President Theodore Roosevelt would have visited turn-of-the-century Girls or that he would have told an audience of young women, as he told Central boys, "Don't flinch, don't foul, and hit the line hard." *Id.*

[13] The court of appeals and, to a lesser extent, the district court failed to accord sufficient weight to the admitted superiority of Central High in the field of science. Both courts, after acknowledging the superiority of Central's science facilities, then label the facilities and education of the two schools "comparable." (Opinion of Court of Appeals, Pet. 3a-5a. District Court Fact Finding 30; Pet. 45a.) This is a contradiction; if one school has better facilities than another school, then the facilities are not equal or "comparable."

boasts a cyclotron built by its own students and the first planetarium in any high school in the country. (Testimony of Ralph Keen, App. 39a-40a.) Central has a slightly smaller student body than Girls High, yet Central has one more science teacher and one more math teacher than Girls. (Answers to Plaintiff's Interrogatories at 4, 10, and 12.) The bonus Central enjoys in science and math faculty is nowhere compensated in Girls' faculty; Central simply has two more faculty members than Girls, although Central serves fewer students. (Answers to Plaintiff's Interrogatories at 7.)

The class petitioner represents includes potential physicians, research scientists and engineers, talented young women plainly disadvantaged by the denial of equal facilities. Like Susan Vorchheimer, who won awards in geometry and science (Fact Finding 14; Pet. 41a), these young women have a right to the best science education the city offers without discrimination on the basis of sex. Reservation of the best science education for boys betrays a view of the talents and position of the two sexes at odds with the ethos of modern society.[14]

Susan Vorchheimer, visiting Central and Girls High to decide the course of her education, sensed immediately the differences between the two schools. Asked at trial why she decided she wanted to go to Central, she responded:

> I visited several schools that were among my choices and one of them was Central and I liked it there. I liked the atmosphere and also what I had heard about it, about its academic excellence.

[14] See pp. 34-35 *infra*.

(Testimony of Susan Lynn Vorchheimer, App. 25a.) Asked if she had considered Girls, she replied:

> Yes. I also visited Girls and sat in on one of the classes and walked around and I just didn't like the impression it gave me. I didn't think I would be able to go there for three years and not be harmed in any way by it.

(Testimony of Susan Lynn Vorchheimer, App. 28a.) Basing her decision on the precise factors this Court recognized in *Sweatt* v. *Painter, supra,* 339 U.S. at 633-34, as critical considerations in assessing the quality of a school, Susan Vorchheimer chose Central. But Central closed its doors to her solely because of her sex.

Not content with second best, Susan Vorchheimer and the class she represents seek to open Philadelphia's finest high school to all academically-talented students regardless of sex. For one hundred and forty years the best—Central High—has been reserved for Philadelphia's young men. Like the black students seeking admission to the University of Texas Law School in *Sweatt* v. *Painter, supra,*[15] the young women of Philadelphia with high aspirations and the scholastic abilities to match now ask for equal opportunity, for the right to attend the premier school the public maintains for its future leaders.

[15] Particularly significant in light of the factors this Court stressed in *Sweatt* is Central's impressive record of elevating sons of modest families, immigrant parents, and members of minority groups to positions of prestige and high social and economic status.

2. In a Society With "a Long and Unfortunate History of Sex Discrimination," Total Sex Segregation in Municipal Secondary Schools for Superior Students Impedes Women's Opportunities to Establish Themselves in Academia, Business, the Professions, and Politics as Fully Equal to Men.

Even if Girls' facilities, origin and history approached the theoretical "separate but equal" model, the claim of the class herein would be well founded. The very names assigned the two schools tell the story; the designations "Central" and "Girls" are symbolic of a larger inequality identical facilities and endowments would not cure.

Central, for generations, has been the training ground for those destined to the ranks of Philadelphia's dominant actors; Girls has been the place for the sex long considered auxiliary. No doubt this compartmentalization has a "long history" and "world-wide acceptance." Indeed, petitioner stipulated to the tenacity of the practice and the view even of some modern educators that sex separation in learning situations is "natural" and "reasonable." 532 F.2d at 882 (Pet. 4a). But upon objective, unromanticized appraisal of that "history" and "acceptance" in schools, on the job and in the home

> [o]ne realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.[16]

In perhaps the most thoughtful study of the problem to date, pursued in the context of college education, Christopher Jencks and David Reisman concluded:

[16] *Green* v. *Waterford Board of Education,* 473 F.2d 629, 634 (2d Cir. 1973).

> The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges . . . . The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay.

The Academic Revolution 297-98 (1968).[17] Jencks and Reisman further observed that men too pay a price for the sexual arrogance preserved by all-male schools. And they commented that the arguments against women's schools, though impressive, are not as persuasive as the arguments

[17] *Cf.* this Court's recognition in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954):

> To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

A similar consequence follows when female applicants are excluded from a prestigious all-male institution. As poignantly stated by a young woman who succeeded in "desegregating" a formerly all-male public high school for gifted students seven years ago: "The exclusion [of females from New York City's Stuyvesant High School] insinuates immaturity on the part of girls—and certainly produces it in both sexes. A boy who has never worked with a girl in the classroom is bound to think of her as his intellectual inferior . . . . It really messes up the growth of a person's mind." de Rivera, On De-Segregating Stuyvesant High, in Sisterhood Is Powerful 366, 371 (R. Morgan ed. 1970).

Ms. de Rivera's conclusion has been verified by attitudinal research, which shows that both males and females tend to regard women as more passive and men as more "potent," and that this tendency is significantly greater among members of both sexes who attend single-sex schools. R. Dale, *Mixed or Single-Sex School?* vol. III, 221-22 (1974).

against men's schools: "This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense." *Id.* at 298.

In sum, Philadelphia School District's refusal to admit Susan Vorchheimer and her class to Central, and its insistence that these academically-gifted young women be content with their place at Girls, viewed in historical and social context, carry a clear message. In a world and nation with "a long and unfortunate history of sex discrimination," *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973),[18] Philadelphia School District's policy signals to women that they should not anticipate full and equal partnership with men; the policy places an official imprimatur on categorization of females as members of "the second sex."

B. *A Municipality's Exclusion of Females From an Educational Opportunity, Solely on the Basis of Sex, Cannot Survive Measurement Against This Court's Decisions Acknowledging as Constitutional Principle the Right of Females to the Genuinely Equal Protection of the Laws.*

1. This Court's Decisions Recognize Education as a Vital Government Function With an Overwhelming Impact on the Life of Individuals and of the Nation.

Repeated recognition has been given by this Court to the preeminent importance of education in our society. The Court has acknowledged the tremendous impact education

[18] See also *Mathews* v. *Lucas*, —— U.S. ——, 96 S. Ct. 2755, 2762 (1976) (historic legal and political discrimination based on sex, like discrimination based on race, has been severe and pervasive).

has on the development of the individual and the correlative awesome responsibility placed on those who educate:

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. *Board of Education,* 347 U.S. 483, 493 (1954).

In *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973), although declining an invitation to stamp education a "fundamental right," the Court reaffirmed its "abiding respect for the vital role of education in a free society." Adverting to the "grave significance of education" and the polity's "historic dedication to public education," 411 U.S. at 30, the opinion in *San Antonio* notes, "[w]hat was said [in *Brown*] in the context of racial discrimination has lost none of its vitality with the passage of time." 411 U.S. at 29.

Significantly, four years before the *Brown* decision, the Court emphasized that equal protection measurement of the quality of an educational experience entails more than a checklist of components susceptible to ready quantification. Part of "effective" education is the chance to "engage in discussions and exchange views with other students," peers with whom one will associate, compete and cooperate in occupational and professional pursuits. *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U.S. 637, 641 (1950). Further, of overriding consequence in determining equal opportunity are "those qualities . . . incapable of objective measurement . . . which make for greatness in a . . . school." *Sweatt* v. *Painter,* 339 U.S. 629, 634 (1950). Prime among those qualities, the Court identified the school's historic standing in the community daily indicated by the "position and influence of the alumni." While *Sweatt* and *McLaurin* involved law school and graduate education, the Court stressed in *Brown* that factors taken into account in those earlier decisions, particularly considerations not easily quantified, "apply with added force to children in grade and high schools." 347 U.S. at 494.

The young women whose interests are at stake in this litigation seek education not in "an academic vacuum, removed from the interplay of ideas and the exchange of views" [19] among talented young men and women. Rather, they wish to pursue their studies in an environment that should be the norm for a society in which "equal opportunity is the law." For generations, Central has been the training ground for community leaders in business, politics, the professions. In context of the subordinate place so long assigned to women in society, no school "sister" to Central can supply an educational experience genuinely equal in character, quality and effectiveness.

2. Gender-Based Discrimination That Operates to the Detriment of Females Is Wholly Without Support in Currently Viable Precedent.

In 1971, this Court departed from a century's course of decision consistently affirming official authority to classify

[19] *Sweatt* v. *Painter, supra,* 339 U.S. at 634; see Note, 8 Wash. & Lee L. Rev. 54, 58-59 (1951).

by gender;[20] the Court ruled unanimously that a legislature's "arbitrary preference established in favor of males . . . cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction." *Reed* v. *Reed,* 404 U.S. 71, 74. Idaho's statute requiring, as between persons "equally entitled" to administer a decedent's estate, that "males . . . be preferred to females" was held unconstitutional: the preference failed equal protection measurement because it did not fairly and substantially advance a legitimate legislative objective.[21] *Reed* was appraised by courts and commentators as a path-marking decision. *E.g., Wood* v. *Mills,* 528 F.2d 321, 324 (4th Cir. 1975) (*Reed* and its progeny teach that sex-based classifications require "strong justification"); Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972) ("Only by importing some special suspicion of sex-related means . . . can the [*Reed*] result be made entirely persuasive.").

A year and a half later, in an 8-1 judgment in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), the Court held incon-

[20] *Bradwell* v. *Illinois,* 83 U.S. (16 Wall.) 130 (1873) (no constitutional impediment to exclusion of women from the practice of law); *Minor* v. *Happersett,* 88 U.S. (21 Wall.) 162 (1874) (women are persons and may be citizens but, like children, are properly placed in a special category and have no constitutional entitlement to the franchise); *Muller* v. *Oregon,* 208 U.S. 412 (1908) (working hours limitation denies men due process but is permissible for women); *Goesaert* v. *Cleary,* 335 U.S. 464 (1948) (state may keep bartending a male preserve); *Hoyt* v. *Florida,* 368 U.S. 57 (1961) (female jury service may be restricted to those who volunteer).

[21] The legislative objective in *Reed,* reducing probate court burdens, was altogether legitimate. The means to reach that end, gender classification, was the constitutional shoal on which the statute foundered.

sistent with the equal protection principle federal statutes indulging the presumption that a serviceman's wife, but not a servicewoman's husband, is "dependent." The legislation at issue in *Reed* was a nineteenth century relic, related to the day when married women lacked capacity to contract on their own behalf. In *Frontiero,* by contrast, the Court dealt with 1949 and 1956 legislative products, laws reflecting a common statutory arrangement.[22]

Guided by the vibrant precedent established in *Reed* and *Frontiero,* the Court declared unconstitutional a Louisiana law that restricted jury service by women to volunteers. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975). In so ruling, the Court explicitly overturned a 1961 decision, *Hoyt* v. *Florida,* 368 U.S. 57, once formidable authority for the constitutionality of legislative resort to gender pigeonholing in lieu of functional classification.

In *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), a unanimous Court held constitutionally infirm the Social Security Act's provision of a mother's benefit for the caretaker of a deceased male wage earner's child, but no corresponding father's benefit for the caretaker of a deceased female wage earner's child. *Wiesenfeld* was the first occasion on which the Court confronted and rejected a defense emphasizing the factor of cost.[23] Further, the *Wiesenfeld*

[22] See Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L.J. 181 (1973); Note, Presumption of Dependence in Workers' Compensation Death Benefits as a Denial of Equal Protection, 9 U. Mich. J.L. Ref. 138 (1975) (state workers' compensation legislation).

[23] The Solicitor General told the Court in *Wiesenfeld* that "the [annual] cost of [extending benefits to widowed fathers] would be $20 million (and over $300 million if other closely analogous provisions were extended)." Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld, supra.*

opinion dealt sharply with the proposition that in reviewing gender classifications in the social security program, particular deference to the legislative judgment should be the judicial perspective.

Most recently, in *Stanton* v. *Stanton,* 421 U.S. 7 (1975), the Court held unconstitutional Utah's age of majority differential, 18 for girls, 21 for boys, applicable to a parent's child support obligation. Mr. Justice Blackmun, writing for eight members of the Court, emphasized the importance of equal educational opportunity to a society in which women and men live and work together in full partnership: "The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice." 421 U.S. at 15.[24]

In *Taylor, Wiesenfeld* and *Stanton,* as in *Reed, Frontiero,* and the case at bar, it was apparent that women were harmed by the classifications in question. Though Billy Jo Taylor is a man, his case was argued in tandem with *Edwards* v. *Healy,* 421 U.S. 772 (1975) (remanded for mootness determination), in which female complainants charged that Louisiana's "benign dispensation" served to keep women in their place. *Stanton* was brought to secure support for a daughter. *Wiesenfeld* developed the point, initially made in *Frontiero,* that presuming women "dependent," men "independent" contributes to and exacerbates discrimination encountered by female wage earners.

On the other hand, the Court has upheld gender lines regarded as operating solely to compensate women for past

[24] Cf. *Mathews* v. *Lucas,* —— U.S. ——, 96 S. Ct. 2755, 2762 (1976).

and present economic disadvantages, classifications perceived by the Court as helpful to some women, harmful to none. *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974).[25] However, most gender lines in the law, this Court has acknowledged, tend to pigeonhole and limit the options of members of both sexes. See *Wiesenfeld, supra,* 420 U.S. at 651-52. And the Court is no longer susceptible, as it once was,[26] to compensatory rationalizations for laws predicated on generalized assumptions about "the way women (or men) are." See generally Note, 89 Harv. L. Rev. 95 (1975).

"Compensation" or "rectification" for past injustice or disadvantage, of course, is not proffered here as a rationale for discrimination. On the contrary, the district court determined that "fostering career successful women is not one of [Philadelphia School District's] objectives" in excluding females from the District's Central High School. (Conclusion 5; Pet. 56a.) Susan Vorchheimer and other talented young women similarly circumstanced are not kept out of Central for their own benefit, protection or advancement. Rather, as the district court noted, "males, and not females, are the intended beneficiaries of [Philadelphia School District's] exclusionary policy." (Pet. 84a.)

[25] See also *Kohr* v. *Weinberger,* 378 F. Supp. 1299 (E.D. Pa. 1974), *judgment vacated,* 422 U.S. 1050 (1975); *Polelle* v. *Secretary of Health, Education and Welfare,* 386 F. Supp. 443 (E.D. Ill. 1974); *Lewis* v. *Cohen,* 417 F. Supp. 1047 (E.D. Pa. 1976) (in according female wage earners a retirement benefit computation formula more favorable than the one applicable to male wage earners, Congress legitimately took into account 1) pervasive wage discrimination against gainfully-employed women, and 2) compulsory early retirement policies applied by employers to female workers but not to male workers—favorable formula alleviated this discrimination against wage-earning women without disadvantaging any member of that class).

[26] See note 20 *supra.*

In sum, exclusion of girls from Central, thus from the unique facilities, tangible and intangible, that premier school offers, dampens the aspirations, reduces the opportunities, and limits the expectations of Philadelphia's brightest young women. The denial of genuinely equal opportunity to the class herein cannot stand in the face of this Court's decisions from *Reed* through *Stanton*.

3. This Court's Summary Affirmance in *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971), Confirms That the Constitution Does Not Safeguard to Males or Females the Right to Attend a State-Operated College to Which They May Commute; *Williams* v. *McNair* Does Not Supply Authority for the Optionless Sex Segregation in the Case at Bar.

Principal reliance has been placed by respondents on this Court's summary disposition in *Williams* v. *McNair, supra.* (Br. Opp. 10-12.) Similarly, the court of appeals majority saw "no basis for differentiating between *Williams* and the case at bar," and viewed that decision as "strong, if not controlling authority." 532 F.2d at 887 (Pet. 15a). Closer inspection should have revealed that *Williams* v. *McNair* is not genuinely in point. For that case entailed no optionless sex segregation, nor any educational disadvantage imposed on members of one sex.

Williams v. *McNair* concerned South Carolina's university system, a system comprising a wide range of educational institutions, all but two of them coeducational. The first exception, the Citadel, was an all-male college. Designated as a military school, the Citadel granted degrees in engineering and also offered a full complement of undergraduate liberal arts courses. The second, Winthrop, was

"designed as a school for young ladies . . . [giving] special attention to many courses thought to be specially helpful to female students." 316 F. Supp. at 136.[27]

Plaintiffs in *Williams* v. *McNair* were males who sought admission to Winthrop. They were "free to attend either an all-male or . . . a number of co-educational institutions at various locations over the State." 316 F. Supp. at 137-38. They claimed no special feature connected with Winthrop that would "make it more advantageous educationally to them than any number of other State-supported institutions." 316 F. Supp. at 138. In short, a principal factor on which their preference for Winthrop rested was its proximity to their homes. Ruling that the Constitution does not safeguard to students a right to attend the state college in their home town, the district court entered judgment for defendants and this Court summarily affirmed.[28]

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[27] A clarifying footnote to the district court's opinion sets out relevant provisions of the South Carolina Code as follows (316 F. Supp. at 136 n.3):

> See Section 401, Title 22, Code of South Carolina (1962):
>
> "There shall be established an institution for the practical training and higher education of white girls which shall be known as Winthrop College * * *."
>
> In Section 408, Title 22, the purpose of Winthrop College was stated to be:
>
> "The establishment, conduct and maintenance of a first-class institution for the thorough education of the white girls of this State, the main object of which shall be (1) to give to young women such education as shall fit them for teaching and (2) to give instruction to young women in stenography, typewriting, telegraphy, bookkeeping, drawing (freehand, mechanical, architectural, etc.), designing, engraving, sewing, dress-making, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness . . . ."

[28] The district court opinion in *Williams* v. *McNair* does essay appraisal of the then "state of the art" on constitutional challenges

The summary affirmance in *Williams* v. *McNair*, rendered without hearing argument and without opinion, and never cited as precedent by this Court, must be assessed with the precise facts of that case firmly in view. Not even remotely involved in *Williams* v. *McNair* was any claim that Winthrop's existence deprived males of the best educational opportunities the state supplied. The complainants in *Williams* v. *McNair* had a wide choice among state institutions, including prestigious coeducational institutions, for any program they might wish to pursue. In stark contrast, the class herein does claim denial of access to an institution that is more advantageous educationally than any other institution, an institution possessing superior scientific facilities and, most significantly, intangible qualities, including the "position and influence of the alumni," that give it unparalleled standing in the community. See *Sweatt* v. *Painter, supra,* 339 U.S. at 634.

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to official line drawing by gender. The opinion sets out as the most recent High Court expression *Hoyt* v. *Florida*, 368 U.S. 57 (1961), a decision now overturned, see *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); it states that gender-based discrimination by law or regulation is constitutional unless "wanting in any rational justification." 316 F. Supp. at 136. This Court's summary affirmance in *Williams* surely does not imply agreement with that proposition. Rather, full opinions of "this Court treating the question on the merits" (*Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974)), indicate the heightened review standard evolving in gender discrimination cases since *Reed* v. *Reed, supra,* the path-marking decision rendered some months after the *Williams* summary affirmance. See, *e.g.*, *Weinberger* v. *Wiesenfeld, supra, Stanton* v. *Stanton, supra.*

II.

Excluding females from Central High School does not fairly and substantially serve any legitimate objective of the Philadelphia School District.

In reviewing gender-based classifications this Court examines asserted justifications in light of the genuine objectives sought to be served, and does not hypothecate rationalizations for such classifications. See *Weinberger* v. *Wiesenfeld, supra.* The general purposes of the Philadelphia School District, as stated in the District Court Fact Findings, are: producing "good and constructive citizens, who are literate in every sense, and who are able to communicate effectively"; teaching "saleable skills." (Fact Finding 48; Pet. 52a-53a.) Specific goals include: "increasing the efficiency and basic skills of the students"; "providing educational options to students and their parents." (Fact Finding 49; Pet. 53a.) A goal long served by Central High School, a "higher institution" envisioned as a facility "stronger and more progressive" than other District schools, is leadership training. See Cornog, *op. cit. supra,* at 310.

Maximizing time spent on homework is not one of the School District's goals. (Fact Finding 50; Pet. 53a.) Nor is socializing students to conform to traditional masculine and feminine roles. On the contrary, the District is specifically mandated by the State Department of Education to take affirmative action to eliminate "sexism" from its curriculum, teaching materials and personnel policies. (Plaintiff's Exhibit P, at 2.)

The record in this case indicates no educational objective served fairly and substantially by excluding girls from Philadelphia's premier Central school. Achievement of Philadelphia's academically-superior students was not shown to be greater in sex-segregated schools than in co-educational schools. Nor does exclusion of females from Central assist members of the class herein "to adjust normally to [their] environment," or to "prepar[e] . . . for later professional training." *Brown* v. *Board of Education, supra,* 347 U.S. at 493.

Achievement of females in the sciences and their preparation for later professional training in scientific fields are objectives manifestly disserved by reservation of Central's concededly superior facilities to males. The gross underrepresentation of women in the sciences has generated widespread recent discussion and concern. A Scientific Manpower Commission report on doctorates achieved by men and women in the United States is illustrative: in the years 1970-1975, 42% of the doctorates in modern foreign languages, but only 7% of the doctorates in the physical sciences, were earned by women;[29] in 1974-1975, only 53 women, 1.7% of the total, achieved doctorates in engineering.[30] Yet there is a clear consensus among educators that female students possess in full measure ability to succeed in scientific studies. The problem, uniformly identified: females are deliberately channelled away from specialization in mathematics and science in preparatory education.[31] Consequently, they lack the background and training requisite to advancement in professions that rely heavily on these disciplines.

[29] B. Vetter & E. Babco, Professional Women and Minorities: A Manpower Data Resource Service (1975), October 1976 Supp. at 51.

[30] *Id.,* October 1976 Supp. at 317.

In the district court, appellant Susan Vorchheimer stipulated to the evident historic fact that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach."[32] 532 F.2d at 882 (Pet. 4a). But nothing in the record identifies the premises underlying that approach. The court of appeals majority speculated that the approach may be based on "human experience,"[33] and a "theory of equal benefit." 532 F.2d at 887 (Pet. 13a-14a). More likely, the judgment that sex-segregated education is "natural and reasonable" is rooted in die-hard habits of thought, customary generalizations concerning the expected behavior, proclivities and preferences

[31] See L. Baker, I'm Radcliffe! Fly Me!—The Seven Sisters and the Failure of Women's Education 167 (1976); E. Maccoby & C. Jacklin, The Psychology of Sex Differences 367 (1974); N. Frazier & M. Sadker, Sexism in School and Society 136 (1973); J. Michaels & D. McCulloch, Rationale and Design for Reducing Sex Differences in Occupational and Educational Attainment by Strengthening Across-Sex Peer Influences, Johns Hopkins University Center for Social Organization of Schools Report No. 196, at 3-4 (May 1975); P. Boring, Sex Stereotyping in Educational Guidance, in Sex Role Stereotyping in the Schools 14, 16-17 (National Education Association 1973).

[32] However, even proponents of single-sex education acknowledge that the overwhelming weight of opinion among educators in the United States favors coeducation. J. Jones & J. Shallcrass, Coeducation and Adolescent Values, 63 J. of Ed. Psych. 334 (1972); W. Kolesnik, Educational Psychology 121 (2d ed. 1970) (cited in Defendants' Requests for Admissions at 4, para. 14).

[33] Cf. *Lamb* v. *Brown,* 456 F.2d 18, 20 (10th Cir. 1972) (rejecting "the demonstrated facts of life" as support for gender lines in the law).

of the two sexes, familiar, overbroad assumptions about "the way girls and women (or boys and men) are" [34]—in short, the very generalizations and assumptions this Court has firmly rejected as grounds for separate legal regulation of the sexes. See *Stanton* v. *Stanton, supra.*

In lieu of the stimulus and challenge furnished by interaction with males as intellectual peers, co-workers and competitors, Philadelphia School District offers the class herein an "artificial temporary community" [35] that lacks correspondence with the world outside. Concomitantly, the School District's policy breeds myopia in young men. "[I]n a time which values the female intellect, male students must grow up with the awareness that it does indeed exist." S. Hyde, Jr., Dean of Faculty, Report to the Trustees of Andover, reprinted in 64 Andover Bulletin 1, 4 (January 1971), and 31 Independent School Bulletin 20, 22 (December 1971).[36] Retention of Central as a male preserve impedes that awareness, perpetuates inequities to which females are exposed, and in fact is a prime example of them.

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[34] The perspective of a leading advocate of single-sex education is illustrative: "The coeducational school is . . . contributing to . . . confusion among men as well as women as to what masculinity and femininity are all about." W. Kolesnik, Coeducation: Sex Differences and the School 10 (1969) (cited in Defendants' Requests for Admissions at 4, para. 17).

[35] Schneider, Our Failures Only Marry: Bryn Mawr and the Failure of Feminism, in Woman in Sexist Society (V. Gornick & B. Moran eds. 1971).

[36] Cf. A. William Olsen, Jr., Headmaster, A Look into the Future, Hotchkiss Alumni Magazine 3 (Spring 1973): "One of the goals I have for Hotchkiss is that it prepare its youngsters for the world into which they will be moving. For their sake we cannot afford to do anything else. This is going to be a coeducational world. Men are going to be working side by side with women, not just living with them. The sooner we as a school accept this fact the better."

To justify its policy, Philadelphia School District relied on the testimony of two expert witnesses: Dr. J. Charles Jones, who reported on an *attitude* (not *achievement*)[37] survey he administered in New Zealand general schools; Dr. M. Elizabeth Tidball, who reported the results of her random selections from 1910's to 1950's Who's Who of American Women.

Dr. Jones acknowledged, and the district court found, that the New Zealand general school survey was uninstructive as to the environment, single-sex or coeducational, best suited to Philadelphia's academically-superior students. (Fact Findings 39-50, Conclusion 5; Pet. 48a-53a, 55a-56a.) Nonetheless, the court of appeals majority found impressive Dr. Jones's "hypotheses" as to the higher regard of single-sex school students for scholastic achievement. 532 F.2d at 882. But compare with the *hypotheses* credited by the majority below, the *experience* reported by formerly all-male United States schools attracting academically-gifted students:[38]

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[37] *But see* R. Dale, *op. cit. supra,* at 266: Studies measuring educational achievement "show with reasonable definitude that the common belief that boys make better progress in single-sex schools —and even that such schools have a higher attainment level than co-educational ones—is a myth, and it appears probable that the advantage lies with boys in co-educational schools." Even the validity of Dr. Jones's attitudinal survey has been put in question by a more recent study, based on a broader sample, which reached contrary results. Fenner, Coeducational Values and Satisfaction with School, 66 J. of Ed. Psych. 9 (1974).

[38] During the past decade, the movement toward coeducation in the United States has been overwhelming. Particularly striking is the change in the complexion of private institutions. Operating free from fourteenth amendment or statutory strictures, these institutions have embraced coeducation as a matter of sound educational policy. The National Association of Independent Schools reports that in the academic year 1963-1964, only 38.3% of its

[I]t is unquestionable that the addition of girls to the student body and of women to the faculty has made Exeter a stronger and more interesting school. (F. Tremallo, Associate Dean of Students, The Phillips Exeter Academy, May 5, 1972.)

Princeton is now in its third year of undergraduate coeducation . . . . Members of the faculty and the administration have found that the participation of women has made for a better academic atmosphere. (R. Goheen, Princeton University President's Report 5 (October 1971).)

[C]oeducation [was] regarded as an overwhelming success by every [Andover] student and faculty group that could be identified. (F. Peterson, Jr., Director of the Office of Research and Evaluation, 68 Andover Bulletin 1 (Winter 1975).)

Dr. Tidball's sampling,[39] the district court concluded, "appears to be inapplicable to academic performance at an

member schools were coeducational. By 1974-75, 66.4% were coeducational. Coeducation Packet Supplement: Reports from Schools on Their Experience with Coeducation, National Association of Independent Schools (1976).

Among distinguished day and boarding secondary schools which have become coeducational, either through merger or the acceptance of students of the formerly excluded sex, are: Andover-Abbott, Massachusetts; St. Paul's, New Hampshire; Exeter, New Hampshire; Hotchkiss, Connecticut; Trinity, New York; St. Paul-Summit, Minnesota; Denver-Kent, Colorado; Lakeside-St. Nicholas, Washington.

Among colleges and universities, Harvard has merged with Radcliffe, Brown with Pembroke, and Notre Dame with St. Mary's. Yale, Princeton, Dartmouth, and Amherst accept women. Bennington, Vassar, Sarah Lawrence and Connecticut College accept men.

[39] Dr. Tidball is a professor of physiology at a medical school. She teaches courses in cardiovascular physiology and experimental

institution such as Central." (Conclusion 5; Pet. 56a.)[40] Even the court of appeals majority relegated her contribution to a footnote. 532 F.2d at 882 n.2 (Pet. 4a).[41] Dr. Tidball did not and could not compare with her women's college achievers what women graduating in the 1910 to 1950 decades might have achieved had they been educated at the nation's most prestigious, richly-endowed colleges.[42] For those institutions, *e.g.*, Amherst, Brown, Dartmouth, Harvard, Princeton, Yale, like Central today, closed their doors to women during the period Dr. Tidball surveyed.

The "women only" colleges that schooled many of the achievers in Dr. Tidball's selection were established, late in the nineteenth century, in substantial part in reaction to the unwillingness of men's colleges to become coeducational.[43]

neuroendocrinology. She has impressive credentials as a physical scientist, but her fields of professional expertise do not encompass educational policy, sociology, or indeed any of the social sciences. (Curriculum Vitae of M. Elizabeth Tidball, Joint Pre-Trial Memorandum, at 20-37.)

[40] In view of this Court's rejection of overbroad generalizations as justification for classification based upon sex, statistical results indicating that single-sex education is beneficial to some, or even most, girls would not justify imposing this system on females who do not conform to the pattern.

[41] Moreover, a more recent study by Dr. Tidball identified Massachusetts Institute of Technology as the undergraduate school producing the highest percentage of female graduates who earned doctorates. The second and third highest were also from coeducational colleges. Tidball & Kistiakowsky, Baccalaureate Origins of American Scientists and Scholars, 193 Science 646, 648 (1976).

[42] Her finding that in the early decades of this century, Who's Who of American Women listed more graduates of women's colleges than graduates of coeducational colleges is as instructive and probative as a finding that in those same years the largest percentage of black doctorates came from Howard University.

[43] See generally L. Baker, I'm Radcliffe! Fly Me!—The Seven Sisters and the Failure of Women's Education (1976); E. Kendall, Peculiar Institutions (1975); E. Flexner, Century of Struggle 23-40, 115-33, 240-43 (rev. ed. 1975).

In sum, the value of Dr. Tidball's testimony is indicated in the remarks of an uncommonly perceptive educator nearly a century ago. Columbia President Frederick A. P. Barnard, in one of his annual pleas for coeducation, his 1881 report to the Columbia board of trustees, wrote:[44]

> The Colleges for women recently established in the State of Massachusetts . . . are, probably, all things considered, the best examples of their kind in the United States; but no thoughtful man can doubt that, had the money expended in their erection been given to Harvard University, with the condition that that institution should do the work which they are doing, the result would have been far more advantageous to the people of the State . . . .

Finally, it bears emphasis that the operation of academic high schools on a totally sex-segregated basis does not promote freedom of choice. For scholastically-superior students seeking the best academic education the Philadelphia system offers, there is no coeducation option. Far from establishing a "fair and substantial relationship" to legitimate educational objectives,[45] see *Reed* v. *Reed, supra,*

[44] L. Baker, *op. cit. supra* note 43, at 15. See also *id.* at 141: "Founded not to provide leadership for a society but to provide intellectual exercise for the heretofore academically disenfranchised, the women's colleges . . . generally left both the rights and responsibilities for leadership to their betters."

[45] In general, Philadelphia School District pursues a policy of coeducation. Only five schools of over 20 secondary schools in the Philadelphia system were single-sex at the time of trial. (Fact Finding 31; Pet. 45a-46a.) In 1974, the District converted one of its few single-sex schools to a coeducational facility. (Answers to Plaintiff's Interrogatories at 13.) Since the trial, the number of one-sex schools, including Central and Girls, has been reduced to four. Under the circumstances, Philadelphia School District's own policy is inconsistent with the testimony of the witnesses it called to establish the superiority of single-sex education. (See Pet. 83a.)

404 U.S. at 76, Philadelphia School District's policy reinforces a tradition that retards progress toward a society in which women and men stand together as full and equal partners.[46]

III.

Exclusion of females from Philadelphia School District's Central High School violates the Equal Educational Opportunities Act of 1974, in which Congress proscribed assignment of students to schools solely on the basis of sex.

In the Equal Educational Opportunities Act of 1974, Congress declared "all children enrolled in public schools are entitled to equal educational opportunity without regard to . . . sex . . . ." 20 U.S.C. §1701(a)(1). Congress found "the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies to those students the equal protection of the laws . . . ." 20 U.S.C. §1702(a)(1). And Congress outlawed school assignments that result "in a greater degree of segregation of students on the basis of . . . sex . . . ." 20 U.S.C. §1703(c). Further, Congress stipulated that assignments based on grade level or type of education, to conform to equal educational opportunity and equal protection laws, must not have as a purpose "segregating stu-

[46] See S. Hyde, Jr., Dean of the Andover Faculty, The Case for Coeducation, 64 Andover Bulletin 1, 4 (January 1971), 31 Independent School Bulletin 20, 22 (December 1971): "The modern partnership of adult men and women depends upon mutual respect for the abilities and qualities of the other sex, on appreciation of similarities as well as differences; and this understanding requires a sharing of experience with the other sex . . . throughout the years of formal education."

dents on the basis of . . . sex . . . ." 20 U.S.C. §1705. In these clear words, Congress proscribed the very conduct at issue here.

Philadelphia operates a dual school system on the basis of sex in its senior academic high schools. See 20 U.S.C. §1702(a)(1). Mandatory separation of students by sex in the only schools specially maintained for academically-gifted students surely does increase the degree of segregation on the basis of sex within the school system, precisely the practice prohibited by 20 U.S.C. §1703(c). And by reserving the Central facilities for boys, the Philadelphia School District surely does deny girls equal educational opportunity without regard to sex. See 20 U.S.C. §1701(a)(1).

To override the clear language Congress used, the majority below engaged in a tortured analysis of legislative non-history. No debate or discussion of the 1974 Act[47] adds to or detracts from the plain meaning of the sex discrimination proscription. Unable to cloud the 1974 Congressional text by resort to contemporaneous legislative materials, the court of appeals majority reached back to a statute (Public Law 92-318, Title IX, §901 (1972))[48] enacted over two years earlier by a different Congress. It gleaned from the absence in 1972 legislation of a ban on sex discrimination in academic high school admissions,[49] a legislative intention in 1974 to say one thing and mean another. Commenting on this mode of statutory construction, Judge Gibbons, in his dissenting opinion, said:

[47] Legislative debate, all three court of appeals judges acknowledged, centered on the emotion-laden school busing issue.

[48] 20 U.S.C. §§ 1681 *et seq.*

[49] The 1972 legislation did proscribe sex discrimination in admissions to vocational (technical) high schools. 20 U.S.C. §1681(a)(1).

> The majority argues that Congress spoke clearly in 1972 when it did not enact legislation prohibiting single-sex schools and that the silence of the ninety-second Congress should control . . . interpretation of the words of the ninety-third Congress . . . in 1974. Congressional silence, especially that of a different Congress, . . . can never be used to supersede the otherwise clear language of a statute. (532 F.2d at 891, Pet. 23a.)

Judge Gibbons followed, and the majority below ignored, this Court's instruction that

> [t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction . . . may furnish dubious bases for inference in every direction.

Gemsco, Inc. v. *Walling,* 324 U.S. 244, 260 (1945). For

> [t]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

Lynch v. *Alworth-Stephens Co.,* 267 U.S. 362, 370 (1925), quoting from 294 Fed. 190, 194. See also *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *Ex parte Collett,* 337 U.S. 55, 61 (1949).

Legislative history cleanly in point, of course, should command judicial attention. See *Train* v. *Colorado Public Interest Research Group,* —— U.S. ——, 96 S. Ct. 1938, 1942 (1976); *Cass* v. *United States,* 417 U.S. 72, 78-79 (1974). But where history is ambiguous, the statutory text

itself remains the prime indicia of legislative intent. *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 412 n.29 (1971). And where the history invoked relates to an earlier day, different bills,[50] and a different Congress, the likely result, the one achieved by the majority below, is obfuscation, not clarification.

The Equal Educational Opportunities Act provides secure support, independent of the constitutional ground, for the judgment of the district court. The court of appeals majority reached a contrary conclusion only by ignoring the plain meaning of the words used in the Act and divining legislative intent in a manner that should attract this Court's disapprobation.

[50] In addition to the bill passed in 1972 prohibiting sex discrimination in vocational (technical) high school, but not academic high school admissions, the majority below also referred to an unsuccessful 1972 legislative effort. (532 F.2d at 884, Pet. 8a-9a.) As this Court has pointed out, unsuccessful attempts at legislation are hardly the best guides to legislative intent. *Red Lion Broadcasting Co.* v. *F.C.C.,* 395 U.S. 367, 381-82 n.11 (1969) (inconclusive history of earlier legislative proposals superseded by specific language of bill ultimately enacted).

IV.

This properly certified class action constitutes a vital, continuing controversy so long as females are denied access to Philadelphia's Central High School.

Petitioner was a junior high school student when she commenced this litigation. Mindful of the pace of the judicial process, she did not bring suit "on behalf of [herself] alone," but "cast [her] suit as a class action." *DeFunis* v. *Odegaard,* 416 U.S. 312, 314, 317 (1974). She properly alleged Fed. R. Civ. P. 23(a) and (b) (2) class action prerequisites, and properly moved for class action determination. District Judge Newcomer, following a full airing of the controversy, defined the class with the precision required by Rule 23(c) (3): Susan Vorchheimer was certified as the representative of "all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." (Conclusion 3; Pet. 55a.)

Consistent with a practice commonly employed in Rule 23(b) (2) cases of this genre, District Judge Newcomer deferred decision on class certification until final judgment on the merits. See *Jimenez* v. *Weinberger,* 523 F.2d 689. 697-99 (7th Cir. 1975) (Stevens, C.J.), *cert. denied sub nom. Mathews* v. *Jimenez,* —— U.S. ——, 96 S. Ct. 3200 (1976). In the courts below, respondents did not question that procedure. Opposing certiorari, however, respondents objected, "[t]he court did not act on Petitioners' class action motion prior to the Judgment." (Br. Opp. 17.) Respondents' tardy objection is insubstantial. For Rule 23 plainly affords the district judge flexibility, in an appro-

priate case such as this one, to defer certification "until the moment the merits are decided," to enter "a single order determining both the merits and the identity of the members of the class." *Jiminez* v. *Weinberger, supra,* 523 F.2d at 697, 698.[51] Respondents do not suggest, nor could they, any conceivable prejudice to their position based on the timing of the class determination and definition.

Similarly insubstantial is respondents' further assertion, also raised for the first time in this Court, that a district court's class action certification is invalid absent specific findings enumerating each Rule 23(a) subpart. (Br. Opp. 17.) For this novel proposition, respondents cite only *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128 (1975). Nowhere in *Jacobs* did this Court identify as a flaw fatal to effective certification a district court's failure to spread out in fact findings the Rule 23(a) (1)-(4) formulae. Nor does Rule 23(c) command such findings. Where, as in the instant case, the complaint, motion papers and hearing record fully set forth and document the Rule 23(a) prerequisites and the basis for (b)(2) certification, ritualistic repetition by a district judge of each 23(a) specification is surely not essential to the validity of class action certification.

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[51] In actions in which notice to class members is mandatory, specifically, Rule 23(b)(3) actions, early certification is imperative to afford members a meaningful opportunity to request exclusion from the class. But the reasons for certification at a preliminary stage in a (b)(3) action surely do not apply in the (b)(2) case at bar where the sole relief sought is injunctive and no "opt out" feature is involved. Thus, the Rule 23(c)(1) instruction to certify "as soon as practicable" does not strip the district court of authority in (b)(1) and (b)(2) cases "simultaneously to define the class and to adjudicate the merits." *Jimenez* v. *Weinberger, supra,* 523 F.2d at 698-99, decided after and in light of this Court's decision in *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128 (1975). See 523 F.2d at 700 n.26.

Jacobs, sole authority for respondents' "invalid class certification, ergo moot" afterthought (Br. Opp. 15-17), contrasts sharply with the case at bar. In the instant action, District Judge Newcomer precisely defined the class in the manner directed by Rule 23(c). In *Jacobs,* the district court order furnished no class definition at all; there, this Court addressed a judgment supplying only the opaque designation, "the class whose interests [the plaintiffs] seek to protect." 420 U.S. at 130. Moreover, the student newspaper that triggered the dispute between students and school board in *Jacobs* had ceased publication before the case reached this Court. 420 U.S. at 129. In glaring contradistinction, the situation of the academically-gifted girls who compose the class herein has not changed in any respect. Beyond question, the vital controversy initiated by Susan Vorchheimer continues full strength and in concrete form for a well-defined class so long as females are denied access to Philadelphia's Central High School. That controversy remains active and pointed so long as members of the class find the doors to Philadelphia's oldest and most celebrated secondary school closed to them because of their sex. Philadelphia School District "undoubtedly continue[s] to enforce the challenged [practice] and yet, because of the passage of time," the practice "escapes full appellate review at the behest of any single challenger." *Sosna* v. *Iowa,* 419 U.S. 393, 400, 401 (1975).[52] Consistent with the Court's clear and very recent precedent, *Sosna* v. *Iowa, supra,* the continuation of this genuine controversy between class members and respondents precludes a mootness disposition in this case.

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[52] In view of the grant of certiorari in this case, and the plain message of *Sosna, DeFunis* and *Jimenez, supra,* it may be that respondents will not persist in burdening this Court with their misguided argument concerning the existence *vel non* of a constitutional "case or controversy" herein.

Conclusion

For the reasons stated above, the judgment of the court of appeals should be reversed and the case remanded with instructions to affirm the judgment of the district court enjoining Philadelphia School District from refusing to admit members of the class herein to Central High School solely on the basis of their sex.

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